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No. 90-1187

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

WILLIE HUNTER, JR.,
Appellant,

v.

FOX MCKEITHEN, Secretary of State of Louisiana, *et al.*,
Appellees.

On Appeal from the United States District Court for the Western District of Louisiana

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JURISDICTIONAL STATEMENT

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QUESTIONS PRESENTED

1. Does Section 5 of the Voting Rights Act, 42 U.S.C. Section 1973c, apply to elections for state court judgeships that are created and added to pre-existing judicial election districts?

2. If Section 5 does apply, what relief should be ordered by this Court in light of the district court's refusal to enjoin elections held pursuant to voting changes to which the United States Attorney General has objected under Section 5?

PARTIES

The appellant here and plaintiff in the court below is Willie Hunter, Jr. The appellees here and defendants in the court below are Fox McKeithen, Secretary of State of Louisiana; Jerry M. Fowler, Commissioner of Elections of Louisiana; The State of Louisiana; Fay Perry, Registrar of Voters of Ouachita Parish, Louisiana; The City of Monroe, Louisiana; and the following persons who were candidates in 1990 for judgeships on the City Court of Monroe, Louisiana: E. Roland Charles; Diehlman C. Bernhardt; George S. Carso; Bennie Mac Farrar; Larry Jefferson; Catherine L. Stagg; and John Larry Lolley.

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Appellees.

On Appeal from the United States District Court for the Western District of Louisiana

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JURISDICTIONAL STATEMENT

The appellant, a black citizen and registered voter of Monroe, Louisiana, appeals from the January 15, 1991 judgment of the three-judge court of United States District Court for the Western District of Louisiana. In that judgment, the district court dismissed the appellant's challenge under Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, to at-large elections for Monroe City Court judgeships that are the subject of an objection by the United States Attorney General under Section 5. The district court held Section 5 to be inapplicable.

OPINIONS BELOW

The judgment, opinion, and orders of the district court are unreported and are set out in the appendix as follows: The January 15, 1991 judgment (J.S. App. 12a); the order granting summary judgment, filed January 2,

1991 (J.S. App. 6a); the November 7, 1990 opinion explaining the district court's reasoning (J.S. App. 1a); the November 2, 1990 order of the district court denying injunctive relief (J.S. App. 8a); and the interim order of the district court, filed October 4, 1990 (J.S. App. 10a).

JURISDICTION

The judgment of the district court is dated January 15, 1991. The appellant filed a notice of appeal from that judgment on January 18, 1991. (J.S. App. 20a). The appellant also filed a notice of appeal on November 13, 1990 (J.S. App. 22a) from the three-judge district court's November 2, 1990 order denying injunctive relief. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1253 and 42 U.S.C. § 1973c.

STATUTE INVOLVED

Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c, is reproduced in the appendix. (J.S. App. 24a).

STATEMENT OF THE CASE

Prior to the effective date of Section 5 of the Voting Rights Act, the City Court of Monroe, Louisiana had only one judge. Act 393 of the 1977 session of the Louisiana legislature created a second judgeship, and provided that both judges would be elected at-large from designated divisions (the equivalent of numbered posts). The original judgeship was denominated Division A and the second judgeship Division B, and both were required to be elected pursuant to Louisiana's majority vote reqirement. Without seeking Section 5 preclearance of Act 393, the State implemented the Act and elected a judge for Division B beginning in 1978. It was January 18, 1989, nearly twelve years after passage of Act 393, before the State sought clearance from the United States Attorney General. The State's submission to the Attor-

ney General was incomplete, however, leading the Attorney General to request more information, and the submission did not become finalized until August 24, 1990. (J.S. App. 14a).

Meanwhile, the Louisiana legislature passed Act 8 of the 1990 session, which added a third judge to the Monroe City Court to be elected at-large from the new Division C. The submission of that legislation to the United States Attorney General for preclearance also was completed on August 24, 1990. (J.S. App. 14a).

On October 23, 1990, the Attorney General objected under Section 5 to Act 393 of 1977 and Act 8 of 1990, finding that the State had failed to prove the absence of discriminatory purpose and effect in creating the second and third judgeships to be elected at-large from designated divisions with a majority vote requirement. (The Attorney General's letter is reproduced in the appendix, J.S. App. 14a).

This case was filed in the United States District Court for the Western District of Louisiana seeking enforcement of Section 5 against the unprecleared judgeships, which were scheduled for election in the fall of 1990. Jurisdiction of the district court was invoked under 28 U.S.C. §§ 1343(3) and (4) and 42 U.S.C. §§ 1973c and 1983. The incumbent judge in Division B was unopposed, but candidates were competing in the October 6 primary and the November 6 runoff for the newly created Division C. The plaintiff sought injunctive relief, and in an October 4 order, the district court permitted the election for Division C to go forward, but prohibited the certification of the winner. (J.S. App. 10a). However, in a subsequent November 2 order, the district court permitted certification of the unopposed candidate in Division B and certification of the winner of the impending November 6 runoff in Division C. (J.S. App. 8a).

The November 2 order was issued on a Friday before the Tuesday election, and on the following Monday, No-

vember 5, the plaintiff filed a motion for reconsideration informing the district court of this Court's November 2 injunction against elections for unprecleared judgeships in *Clark v. Roemer*, 59 U.S.L.W. 3360-3361, No. A-827 (Nov. 2, 1990, as modified Nov. 5, 1990). However, the district court took no action until November 7, the day after the election, when it issued an opinion explaining for the first time the reasoning behind its denial of relief. (J.S. App. 1a).

The district court said the denial was mandated by the recent decision in *LULAC v. Clements*, 914 F.2d 620 (5th Cir. 1990) (en banc), in which the en banc Fifth Circuit Court of Appeals held that the results test of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, does not encompass challenges to at-large elections for state court judges. According to the district court, *LULAC*'s holding that Section 2 is inapplicable also means that Section 5 is inapplicable where new elected judgeships are created in pre-existing election districts. (J.S. App. 3a-4a). Nowhere in the district court's opinion was there any mention of this Court's recent summary affirmance of a decision holding that Section 5 requires preclearance of judgeships added to pre-existing election districts, *Brooks v. State Board of Elections*, No. CV 288-146 (S.D. Ga. Dec. 1, 1989) (three-judge court), *aff'd mem.*, 112 L.Ed.2d 243 (1990), even though the district court here was informed of this Court's affirmance in that case shortly after the affirmance was issued on October 15, 1990. The district court did acknowledge this Court's earlier summary affirmance of another three-judge court holding that Section 5 requires preclearance of new judgeships, *Haith v. Martin*, 618 F.Supp. 410 (E.D.N.C. 1985) (three-judge court), *aff'd mem.*, 477 U.S. 901 (1986), and also mentioned this Court's recent injunction against elections for unprecleared judgeships in *Clark*. The district court nevertheless said it was not bound by those decisions.

> This Court recognizes that this decision [denying the injunction] may be in conflict with the opinion

> in *Haith v. Martin*, 618 F.Supp. 410 (E.D.N.C. 1985), *aff'd mem.*, 477 U.S. 901 (1986).
>
> This Court also recognizes that there is a possible conflict between this decision and the Supreme Court's November 2nd ruling in *Clark v. Roemer*, —— U.S. —— (1990). However, since the *Clark* ruling is ambiguous, and the *LULAC* ruling is clear, this court declines to speculate on the possible meaning of *Clark*. Until the Supreme Court or Congress gives the lower courts clearer guidance, this court feels bound by the one clear decision from a controlling authority upon which it can rely.

(J.S. App. 4a).

Following the district court's November 7 decision, the plaintiff filed in this Court a post-election application for stay or injunction pending appeal in order to prevent the winning candidates from taking office in the unprecleared judgeships. This Court denied the application by a 7-2 vote on November 26, 1990. *Hunter v. McKeithen*, 59 U.S.L.W. 3391, No. A-363 (Nov. 26, 1990).

In light of its holding that Section 5 is inapplicable, the district court entered an order, filed January 2, 1991, granting summary judgment against the plaintiff on the Section 5 claim regarding the unprecleared judgeships. (J.S. App. 6a). A final judgment was filed January 15, 1991 (*id.*, 12a) and the plaintiff has taken this appeal.[1]

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[1] The district court did rule for the plaintiff with respect to the unprecleared addition of the areas known as Wards 1, 2, and 4 to the Monroe City Court electorate. (J.S. App. 6a-7a). The Attorney General objected to those additions in the October 23, 1990 Section 5 objection letter (*id.* 15a-16a, 18a), and the district court held that such changes require preclearance. (*Id.* 4a, 6a-7a). No votes from those wards were counted in the 1990 city court elections, and the ruling with respect to those wards is not the subject of this appeal.

THE QUESTIONS ARE SUBSTANTIAL

I. THE DECISION BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT HOLDING THAT SECTION 5 IS APPLICABLE.

In *Brooks* and in *Haith v. Martin*, this Court summarily affirmed lower court holdings that Section 5 applies to the creation of new judgeships in pre-existing election districts. In *Clark v. Roemer*, this Court enjoined elections for state court judgeships that had been the subject of the Attorney General's objection under Section 5.[2] The district court's holding in the present case squarely conflicts with those decisions. This Court has said the following with respect to summary affirmances: "[T]he lower courts are bound by summary decisions of this Court 'until such time as the Court informs [them] that [they] are not.'" *Hicks v. Miranda*, 422 U.S. 332, 344 (1975), *quoting*, *Doe v. Hodgson*, 478 F.2d 537, 539 (2d Cir.), *cert. denied*, 414 U.S. 1096 (1973). The district court here acted as if it were not bound by this Court's summary affirmances in *Brooks* and *Haith v. Martin*, and this Court's decision in *Clark*.

While the district court said its holding was mandated by the Fifth Circuit's Section 2 decision in *LULAC*, the district court also recognized the conflict between its holding and this Court's Section 5 decisions in *Haith v. Martin* and *Clark*. (J.S. App. 4a). To the extent a conflict exists between *LULAC* and this Court's decisions in *Haith*, *Brooks*, and *Clark*, the district court was required to follow the decisions of this Court and not the

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[2] A jurisdictional statement appealing the three-judge district court decision in *Clark* has been filed in this Court, No. 90-952, and this Court noted probable jurisdiction on January 18, 1991. In addition, petitions for certiorari addressing the applicability of Section 2 of the Voting Rights Act to judicial elections have been filed in *Clark*, No. 90-898; *Chisom v. Roemer*, No. 90-757; *United States v. Roemer*, No. 1032; *Houston Lawyers' Association v. Mattox*, No. 90-813; and *LULAC v. Mattox*, No. 90-974, and this Court granted the petitions in the latter four cases on January 18, 1991.

Fifth Circuit. Because the district court failed to follow the rulings of this Court, the decision below must be reversed.

II. THE LANGUAGE OF THE VOTING RIGHTS ACT DEMONSTRATES THAT SECTION 5 APPLIES TO ALL ELECTIONS FOR STATE COURT JUDGES IN COVERED JURISDICTIONS.

Section 5 is a statute with a broad sweep, and its language does not make any exception that excludes judicial elections from its coverage. By its own terms, Section 5 encompasses "*any* voting qualification or prerequisite to voting, or standard, practice, or procedure . . . ." (Emphasis added). In addition, Section 14(c)(1) of the Voting Rights Act defines the meaning of "voting" as used in Section 5 and the rest of the Act in the following manner: "The terms 'vote' or 'voting' shall include all action necessary to make a vote effective in *any primary, special, or general election*, including, but not limited to . . . having [a] ballot counted properly . . . with respect to candidates for *public or party office* . . . ." 42 U.S.C. § 1973*l*(c)(1) (emphasis added). This obviously includes elections for judges. The district court's decision does not comport with the very language of the Act, and accordingly should be reversed.

III. THIS COURT SHOULD SET ASIDE THE ELECTIONS THAT THE DISTRICT COURT PERMITTED TO OCCUR PURSUANT TO UNCLEARED CHANGES, AND THE CASE SHOULD BE REMANDED TO THE DISTRICT COURT FOR CONSIDERATION OF ANY FURTHER RELIEF THAT MAY BE NECESSARY.

Because of the district court's erroneous holding regarding the applicability of Section 5, it permitted the elections to occur and the winners to take office in Divisions B and C even though the Attorney General objected under Section 5 to the method of electing those two judge-

ships. In order to provide effective relief, this Court should now order that the results of the 1990 election process be set aside for the two judgeships.

In *NAACP v. Hampton County Election Commission*, 470 U.S. 166 (1985), this Court ordered the following relief:

> [I]t is appropriate in these circumstances for the District Court to enter an order allowing appellees 30 days in which to submit these changes to the Attorney General for approval. . . . If appellees fail to seek this approval, *or if approval is not forthcoming*, the results of the March, 1983 election *should be set aside.*

470 U.S. at 182-183 (emphasis added). In the present case, the State has submitted the changes to the Attorney General for approval, and the Attorney General has objected. Thus, the Attorney General's approval is not forthcoming and under *Hampton County*, the elections should be set aside.

In addition to ordering the elections set aside, this Court should remand the case to the district court, which can determine what further remedial measures are necessary in light of the rights of black voters under Section 5 and the interests of the State in the smooth functioning of its justice system. For example, the district court can consider in the first instance whether it is possible to hold new elections for the uncleared seats under an interim court-ordered plan that cures the Section 5 deficiencies and permits the judgeships to remain functional. *See Hathorn v. Lovorn*, 457 U.S. 255, 270 (1982). In the meantime, of course, the State of Louisiana remains free to pass and preclear legislation that would cause these Monroe City Court judgeships to be elected in a manner that satisfies the Voting Rights Act.

CONCLUSION

For the foregoing reasons, and on the basis of the authorities cited, the judgment of the district court should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX

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APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

Civil Action No. 90-2031

JUDGE WIENER
JUDGE STAGG
JUDGE WALTER

WILLIE HUNTER, JR.

versus

CITY OF MONROE, *et al.*

OPINION OF THE COURT

[Filed Nov. 7, 1990]

Background

Plaintiff brought this action for declaratory and injunctive relief under the 14th and 15th amendments of the United States Constitution and under 42 U.S.C. 1973c, commonly known as Section 5 of the Voting Rights Act. Plaintiff alleged that the addition of two seats to the city court bench (divisions "B" and "C"), and the change allowing residents of Ward 4 to vote in City Court elections are in violation of Section 5 of the Voting Rights Act because, although submissions were made to the Justice Department, no decision on pre-

clearance had been made. All parties stipulate that Louisiana and its political subdivisions are subject to all applicable provisions of the Voting Rights Act.

On September 13, 1990, this three-judge court was constituted by order of Thomas Gibbs Gee, Acting Chief Judge of the United States Court of Appeals for the Fifth Circuit. On September 28, 1990, The Fifth Circuit handed down its opinion in the case of *League of United Latin American Citizens Council No. 4434, et al v. Clements, et al*, Docket No. 90-8014 (September 28, 1990), (hereafter, *LULAC*).

Following the rationale of *LULAC*, this court enjoined the counting of Ward 4 votes, but did not enjoin the elections. The October 6th election was held as scheduled.

On October 23, 1990, the Voting Rights Section of the Justice Department objected to all of the changes which are at issue in this lawsuit. This court then amended its order to permanently enjoin the use of votes cast by residents of Ward 4, and to allow the state to certify winners in the City Court elections without the use of the Ward 4 votes. However, still in reliance on *LULAC*, this court refused to enjoin the implementation of the additional judicial seats and allowed the run-off election to proceed.

LAW

The *LULAC* decision expressly overruled the Fifth Circuit's previous decision in *Chisom v. Edwards*, 839 F.2d 1056 (5th Cir. 1988), which held that Section 2 of the Voting Rights Act, as amended in 1982, applied to judicial elections. The Fifth Circuit held that judges are not "representatives" of those who elect them, but are servants whose purpose is to interpret the law; therefore, the "results" test in Section 2 does not apply. The court based its decision primarily on its interpretation of the 1982 amendment to Section 2, holding that the

"results" test embodied in the amendment "extends the Congressional, non-Constitutional. . . claims no further than the legislative and executive branches, leaving the underlying Constitutional "intent" test in place as to all three." *LULAC*, slip opinion p.3. In other words, the "results" test of Section 2 as amended does not apply to election practices or procedures affecting solely judicial elections.

The majority opinion from the Fifth Circuit did not expressly address the issue of the applicability of Section 5 to judicial elections.[1] However, this Court holds that, under the reasoning in *LULAC*, Section 5 cannot apply to the creation of additional seats in a pre-existing area as was done in the case now before it. Section 5 of the Voting Rights Act works "in tandem" with Section 2. Section 2 defines what constitutes a violation of the Voting Rights Act in the area of election practices and procedures. Section 5 requires pre-clearance of any changes in such practices and procedures. To hold that Section 5 applies in circumstances where Section 2 could not is to provide a remedy without a wrong. Section 5 preclearance is required to *prevent* violations as delineated in Section 2. There is no way that the addition of more judges, to be elected by the same voters who elect the present judges, and whose jurisdiction will be exactly the same as that of the existing judges, can violate Section 2; therefore, there is simply no reason for preclearance.

Even though the Justice Department denied clearance to the proposed change in the number of judges to be elected to the City Court bench, the denial can have no effect for without even the possibility of a violation, the court has no grounds to enjoin the election implementing

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[1] Although the Court did note, almost *en passant*, at p.20 of the slip opinion, the *Haith* decision, cited *infra*.

the new practice or procedure or otherwise fashion a remedy.

This court recognizes that this decision may be in conflict with the opinion in *Haith v. Martin*, 618 F. Supp. 410 (E.D.N.C. 1985), *aff'd. mem.*, 477 U.S. 901 (1986).

This court also recognizes that there is a possible conflict between this decision and the Supreme Court's November 2nd ruling in *Clark v. Roemer*, —— U.S. —— (1990). However, since the *Clark* ruling is ambiguous, and the *LULAC* ruling is clear, this court declines to speculate on the possible meaning of *Clark*. Until the Supreme Court or Congress gives the lower courts clearer guidance, this court feels bound by the one clear decision from a controlling authority upon which it can rely. No purpose is served by submission of the question of creation of districts "B" and "C" for pre-clearance since, if denied—by action or inaction—injunction would be prohibited under the clear terms of *LULAC*. The court would be protecting a remedy that is without an injury.

As to the addition of Ward 4 voters to "A." "B." and "C." the possibility of an intentional dilution of minority voting strength does arise. Since an intentional dilution would come under the Constitutional "intent" test still present in the Voting Rights Act and still applicable to judicial elections, pre-clearance or a declaratory judgment from a three-judge Court from the D.C. Circuit will be necessary before such a change can be given effect. Since the Justice Department has objected to the changes, the votes of the Ward 4 voters can not be given effect without a change in the Justice Department's ruling or a declaratory judgment. Therefore, the preliminary injunction of the original order was made permanent by the order filed November 2, 1990.

All pending motions in this case are remanded to a single judge a three-judge court being unnecessary for a

hearing on them. THUS DONE AND SIGNED this 7th day of November, 1990.

/s/ Jacques L. Wiener
JACQUES L. WIENER
United States Circuit Judge

/s/ Tom Stagg
TOM STAGG
Chief United States District Judge

/s/ Donald E. Walter
DONALD E. WALTER
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

Civil Action No. 90-2031

WILLIE HUNTER, JR.,

Plaintiff,

versus

CITY OF MONROE, *et al.*,

Defendants.

THREE-JUDGE COURT

JACQUES L. WIENER, JR.—United States Circuit Judge

TOM STAGG—Chief, United States District Judge

DONALD E. WALTER—United States District Judge

ORDER GRANTING SUMMARY JUDGMENT

[Filed Jan. 2, 1991]

In light of this Court's opinion of November 7, 1990, and because there is no genuine issue as to any material fact, summary judgment is hereby issued under Rule 56, F.R.Civ.P., as follows:

1. With respect to the addition of Ward 4 to the electorate of the Monroe City Court, summary judgment is entered for the plaintiff. That addition has not been precleared and has been the subject of an objection by the United States Attorney General under Section 5 of the Voting Rights Act, 42 U.S.C. Section 1973c. Accordingly, the Court declares that any implementation of that addition in the absence of preclearance violates Section 5. The defendants are permanently enjoined from implementing the addition unless and until preclearance is obtained.

2. With respect to the proposed addition of Wards 1 and 2 to the electorate of the Monroe City Court, summary judgment is entered for the plaintiff. Those proposed additions have not been precleared and have been the subject of an objection by the United States Attorney General under Section 5 of the Voting Rights Act, 42 U.S.C. Section 1973c. Accordingly, the Court declares that any implementation of those additions in the absence of preclearance violates Section 5.

3. With respect to Divisions B and C of the Monroe City Court, judgment is entered for the defendants for the reasons stated in the Court's November 7, 1990 opinion.

The plaintiff's request for attorney's fees has been referred to the Monroe Division judge for decision.

A judgment will be issued pursuant to Rule 58, F.R. Civ.P.

IT IS SO ORDERED. THUS DONE AND SIGNED this 31st day of December, 1990.

/s/ Jacques L. Wiener, Jr.
JACQUES L. WIENER, JR.
United States Circuit Judge

/s/ Tom Stagg
TOM STAGG
Chief United States District Judge

/s/ Donald E. Walter
DONALD E. WALTER
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

Civil Action No. 90-2031

JUDGE WIENER
JUDGE STAGG
JUDGE WALTER

WILLIE HUNTER, JR.

versus

CITY OF MONROE, *et al.*

ORDER

[Filed Nov. 2, 1990]

Pending before this court is plaintiff's motion for reconsideration, certification, and comprehensive relief. For reasons to be stated in an opinion to follow, plaintiff's motion is GRANTED in part and DENIED in part.

Plaintiff's request for reconsideration of this court's denial of the previously requested injunction as to Division "C" is DENIED.

Plaintiff's request for a permanent injunction excluding Ward 4 residents from voting in Monroe City Court elections is GRANTED. In addition, the State defendants are hereby permitted to certify the winners of the Divisions "A," "B," and "C" races without counting the votes cast by residents of Ward 4.

Plaintiff's request that this court hold that Division "B" is required to be precleared or approved is DENIED.

Plaintiff's request for a permanent injunction excluding voters from Wards 1 and 2 from voting for Monroe City Court judges is DENIED because the issue of Wards 1 and 2 is not ripe for injunctive relief.

IT IS SO ORDERED. THUS DONE AND SIGNED this 2nd day of November, 1990.

/s/ Jacques L. Wiener, Jr.
JACQUES L. WIENER, JR.
United States Circuit Judge

/s/ Tom Stagg
TOM STAGG
Chief United States District Judge

/s/ Donald E. Walter
DONALD E. WALTER
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

Civil Action No. 90-2031

JUDGE WIENER
JUDGE STAGG
JUDGE WALTER

WILLIE HUNTER, JR.

versus

CITY OF MONROE, *et al.*

ORDER

[Filed Oct. 4, 1990]

Pending before this court is plaintiff's motion for a preliminary injunction. Plaintiff's motion is granted in part and denied in part. The opinion of this Court is to follow.

The State of Louisiana, acting through the Secretary of State, the Commissioner of Elections, the Ouachita Parish Clerk of Court, the Ouachita Parish Registrar of Voters, the City of Monroe, and all persons acting in active concert with the named government defendants are hereby enjoined from utilizing votes cast in Ward 4, Precinct 1, or in any other precinct where Ward 4 voters are customarily allowed to vote, and from certifying a winner in the Monroe City Court Division "A" or "C" judges' races until such time as pre-clearance is obtained or further order of the Court.

The request for injunction of the election in the Division "C" is Denied.

The motion to dismiss filed by the City of Monroe and plaintiff's request for attorney's fees are referred to the Monroe Division judge for decision. IT IS SO ORDERED.

THUS DONE AND SIGNED this 3rd day of October, 1990.

/s/ Jacques L. Wiener, Jr.
JACQUES L. WIENER, JR.
United States Circuit Judge

/s/ Tom Stagg
TOM STAGG
Chief United States District Judge

/s/ Donald E. Walter
DONALD E. WALTER
United States District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

Civil Action No. 90-2031

THREE-JUDGE COURT

JACQUES L. WIENER, JR.—United States Circuit Judge

TOM STAGG—Chief, United States District Judge

DONALD E. WALTER—United States District Judge

WILLIE HUNTER, JR.,
Plaintiff,

v.

CITY OF MONROE, *et al.*,
Defendants.

[Filed Jan. 15, 1991]

JUDGMENT

This action came on for hearing before this Court, and a decision having been rendered on motion for summary judgment,

IT IS ORDERED AND ADJUDGED that

1. With respect to the addition of Ward 4 to the electorate of Monroe City Court, summary judgment is entered for the plaintiff. That addition has not been precleared and has been the subject of an objection by the United States Attorney General under Section 5 of the Voting Rights Act, 42 U.S.C. Section 1973c. Accord-

ingly, the Court declares that any implementation of that addition in the absence of preclearance violates Section 5. The defendants are permanently enjoined from implementing the addition unless and until preclearance is obtained.

2. With respect to the proposed addition of Wards 1 and 2 to the electorate of the Monroe City Court, summary judgment is entered for the plaintiff. Those proposed additions have not been precleared and have been the subject of an objection by the United States Attorney General under Section 5 of the Voting Rights Act, 42 U.S.C. Section 1973c. Accordingly, the Court declares that any implementation of those additions in the absence of preclearance violates Section 5.

3. With respect to Division B and C of the Monroe City Court, summary judgment is entered for the defendants denying plaintiff's claim that preclearance was required for Divisions "B" and "C".

4. This is a final judgment approved by and entered on behalf of the Court. The plaintiff's request for attorney's fees has been referred to the Monroe Division judge for decision.

Monroe, Louisiana, this 15 day of January, 1991.

/s/ Donald E. Walter
DONALD E. WALTER
District Judge
For the Three-Judge Court

[SEAL]

U.S. DEPARTMENT OF JUSTICE
CIVIL RIGHTS DIVISION

Office of the Assistant Attorney General
Washington, D.C. 20530

October 23, 1990

Cynthia Young Rougeou, Esq.
Assistant Attorney General
P.O. Box 94125
Baton Rouge, Louisiana 70804-9125

Charles L. Hamaker, Esq.
City Attorney
P.O. Box 123
Monroe, Louisiana 71210-0123

Dear Ms. Rougeou and Mr. Hamaker:

This refers to Act No. 393, H.B. No. 945 (1977), which provides for an second judgeship and the adoption of numbered positions (Divisions A and B); Act No. 8, S.B. No. 345 (1990), insofar as it provides for a third judgeship, elected from a numbered position (Division C), the provision that a judge may not practice law, and the implementation schedule; Act No. 728, H.B. No. 2047 (1990), which also provides for a third judgeship and, in addition, provides for a change in method of election from at large to two single-member districts and one at large, a districting plan, the implementation schedule, and the provision that a judge may not practice law; and three annexations for the Monroe City Court in Ouachita Parish, Louisiana, submitted to the Attorney General pursuant to Section 5 of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973c. We received the information to complete your submission on August 24, 1990.

We have considered carefully the information you have provided, as well as comments and information from

other interested parties. At the outset, we note that as of November 1, 1964, the Section 5 coverage date, the Monroe City Court electorate included the residents of Wards 3 and 10 in Ouachita Parish, and the City Court had one elected judge. According to the 1980 Census, this electorate was 48.4 percent black in population. All changes adopted since November 1, 1964, are now before the Attorney General for preclearance. In sum, it is proposed that the Court have three judges elected at large with numbered positions, and under the state's open primary system, they also are to be elected by majority vote. The geographic jurisdiction of the Court is to be expanded by adding Wards 1, 2, and 4, which would reduce the black population percentage, from 48.4 percent to 39.2 percent, using 1980 Census data. Act No. 728 (1990) also provides for a change to a system of two districts and one at-large position; however, this proposed method of election will become effective only "[i]f the federal courts finally determine that the present method of electing Louisiana trial judges violates Section 2 of the Voting Rights Act of 1965 and requires the subdistricting of such courts as a remedy."

With regard to the annexations, we begin with the proposition that where a jurisdiction seeks to expand its electorate in a manner that significantly reduces black voting strength, Section 5 preclearance may not be granted unless the jurisdiction has obviated the retrogressive effect by adopting an election system "which would afford [black voters] representation reasonably equivalent to their political strength in the enlarged community." *City of Richmond* v. *United States*, 422 U.S. 358, 370 (1975). Our review indicates that the at-large election system for the City Court does not provide black voters with an equal opportunity to participate effectively in the political process and to elect candidates of their choice to the City Court. In particular, City Court elections appear to be characterized by a pattern of racially polar-

ized voting, and there would seem to be a variety of readily discernible alternative election schemes (including, but not limited to, a fairly drawn plan of single-member districts) which would afford black voters a more realistic opportunity to participate in City Court elections and to elect candidates of their choice to these offices.

In that regard, we note that while Ward 4 had been eligible to be added to the City Court jurisdiction since at least 1970, there appears to have been little or no interest in implementing this change until immediately prior to the 1984 City Court primary election, which we understand was marked by the presence of the first black candidate for the City Court. We further understand that prior to that election there was an effort to add Wards 1 and 2 as well.

The two additional City Court judgeships, then, were established in the context of an election system that does not give black voters an equal opportunity to participate in the political process and to elect candidates of their choice to the City Court. Furthermore, the adoption and use of designated positions and a majority vote requirement enhances the discriminatory nature of the election system utilized for filling positions on the City Court and their use, in the context of the racial bloc voting which seems to exist, in our view results in a clear violation of Section 2 of the Voting Rights Act. In addition, with respect to the third judgeship, it appears that it was established as an at-large position over the protest of black leaders and with the knowledge that the district court in *Clark* v. *Edwards*, 724 F. Supp. 294 (M.D. La. 1988), already had found (relying in part on the presence of racially polarized voting in the 1984 City Court contest) that voting is racially polarized in both the district court judicial district and the court of appeals district in which the Monroe City Court is located.

Under Section 5 of the Voting Rights Act, the submitting authority has the burden of showing that a submitted change has neither a discriminatory purpose nor

a discriminatory effect. See *Georgia* v. *United States*, 411 U.S. 526 (1973); see also the Procedures for the Administration of Section 5 (28 C.F.R. 51.52). In addition, our guidelines provide that a submitted change may not be precleared if its implementation would lead to a clear violation of Section 2 of the Act. See 28 C.F.R. 51.55. Because we cannot conclude, as we must under the Voting Rights Act, that your burden has been sustained in this instance, and because our view is that use of the at-large election system with designated posts and majority vote results in a clear violation of Section 2, I must, on behalf of the Attorney General, interpose an objection to the changes occasioned by Act No. 393, Act No. 8 and Act No. 728 relative to the third judgeship position, and the three annexations to the Monroe City Court system.

In reaching this decision, we are not unmindful of the recent decision of the Fifth Circuit Court of Appeals in *League of United Latin American Citizens* v. *Clements*, No. 90-8014 (Sept. 28, 1990) (*"LULAC"*) (*en banc*) which held that the Section 2 results standard is not applicable to judicial elections. The *LULAC* court, however, expressly recognized that "Section 5 of the Act applies to state judicial elections" (Slip op. at 20) and until this matter is clarified further by the courts we see no basis for altering our Section 5 procedural requirements insofar as they relate to Section 2.

With respect to the election method change and districting plan contained in Act No. 728 (1990), it appears that these changes are not capable of implementation at the present time. Also the implementation schedules provided in Act Nos. 8 and 728 (1990) are moot in the current circumstances. Accordingly, no determination is necessary or appropriate with respect to these changes. 28 C.F.R. 51.35.

Lastly, the Attorney General does not interpose any objection to the change in qualifications for serving as a

City Court judge. However, we feel a responsibility to point out that Section 5 of the Voting Rights Act expressly provides that the failure of the Attorney General to object does not bar any subsequent judicial action to enjoin the enforcement of such change. 28 C.F.R. 51.41.

Of course, as provided by Section 5 of the Voting Rights Act, you have the right to seek a declaratory judgment from the United States District Court for the District of Columbia that the changes to which we have objected do not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color. In addition, Section 51.45 of the guidelines permits you to request that the Attorney General reconsider the objections. However, until the objections are withdrawn or a judgment from the District of Columbia Court is obtained, the two additional judgeships, the adoption of designated positions, and the three annexations to the court system continue to be legally unenforceable.

Because this matter is pending before the court in *Hunter* v. *City of Monroe*, C.A. No. 90-2031 (W.D. La.), we are sending a copy of this letter to the court and counsel of record in that case.

Sincerely,

/s/ John R. Dunne
JOHN R. DUNNE
Assistant Attorney General
Civil Rights Division

cc: Honorable Jacques L. Wiener, Jr.
United States Circuit Judge

Honorable Tom Stagg
Chief United States District Judge

Honorable Donald E. Walter
United States District Judge

Honorable John Larry Lolley
Monroe City Court Judge

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Pugh & Pugh

Catherine L. Stagg, Esq.

Mr. Larry Jefferson

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
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Civil Action No. 90-2031

THREE-JUDGE COURT

JACQUES L. WIENER, JR.—United States Circuit Judge
TOM STAGG—Chief, United States District Judge
DONALD E. WALTER—United States District Judge

WILLIE HUNTER, JR.,
Plaintiff,

v.

CITY OF MONROE, ROBERT E. POWELL, MAYOR; FAY PERRY, OUACHITA PARISH REGISTRAR OF VOTERS; WILLIAM "FOX" MCKEITHEN, SECRETARY OF STATE; JERRY M. FOWLER, COMMISSIONER OF ELECTIONS; E. ROLAND CHARLES, DIEHLMANN C. BERNHARDT, GEORGE S. CARSO, BENNIE MAC FARRAR, LARRY JEFFERSON, CATHERINE L. STAGG, JUDGE JOHN LARRY LOLLEY, AND STATE OF LOUISIANA,
Defendants.

NOTICE OF APPEAL

The Plaintiff, Willie Hunter, Jr., files this notice of appeal to the United States Supreme Court from the Judgment of the three-judge district court dated and

filed January 15, 1991. Said Judgment having been entered after entry of the Order Granting Summary Judgment dated December 31, 1991, based upon the record and the opinion of the court filed November 7, 1990.

This appeal is filed pursuant to 42 U.S.C. Section 1973c and 28 U.S.C. Section 1253.

Respectfully Submitted,

JONES & SMITH LAW OFFICES
1110 Jackson Street
Post Office Box 3025
Monroe, Louisiana 71210-3025
(318) 322-1126

By: /s/ Benjamin Jones
BENJAMIN JONES
Bar Roll No. 6065

[Certificate omitted in printing]

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF LOUISIANA
MONROE DIVISION

Civil Action No. 90-2031

THREE-JUDGE COURT

JACQUES L. WIENER, JR.—United States Circuit Judge

TOM STAGG—Chief, United States District Judge

DONALD E. WALTER—United States District Judge

WILLIE HUNTER, JR.,

Plaintiff

versus

CITY OF MONROE, ROBERT E. POWELL, MAYOR; FAY PERRY, OUACHITA PARISH REGISTRAR OF VOTERS; WILLIAM "FOX" MCKEITHEN, SECRETARY OF STATE; JERRY M. FOWLER, COMMISSIONER OF ELECTIONS; E. ROLAND CHARLES, DIEHLMANN C. BERNHARDT, GEORGE S. CARSO, BENNIE MAC FARRAR, LARRY JEFFERSON, CATHERINE L. STAGG, JUDGE JOHN LARRY LOLLEY, AND STATE OF LOUISIANA,

Defendants

NOTICE OF APPEAL

[Filed Nov. 13, 1990]

The Plaintiff, Willie Hunter, Jr., files this notice of appeal to the United States Supreme Court from the decisions of the three-judge district court date November 2, 1990 and November 7, 1990, as well as the decision of October 4, 1990, which was the subject of a motion for reconsideration decided as part of the November 2, 1990

decision. This appeal is filed pursuant to 42 U.S.C. Section 1973c and 28 U.S.C. Section 1253.

Respectfully Submitted,

JONES & SMITH LAW OFFICES
1110 Jackson Street
Post Office Box 3025
Monroe, Louisiana 71210-3025
(318) 322-1126

BY: /s/ Benjamin Jones
BENJAMIN JONES
Bar Roll No. 6065

[Certificate Omitted in Printing]

STATUTE INVOLVED

Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c:

> Whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the first sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1964, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1979b(a) of this title based upon determinations made under the second sentence of section 1979b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1968, or whenever a State or political subdivision with respect to which the prohibitions set forth in section 1973b(a) of this title based upon determinations made under the third sentence of section 1973b(b) of this title are in effect shall enact or seek to administer any voting qualification or prerequisite to voting, or standard, practice, or procedure with respect to voting different from that in force or effect on November 1, 1972, such State or subdivision may institute an action in the United States District Court for the District of Columbia for a declaratory judgment that such qualification, prerequisite, standard, practice, or procedure does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, and unless and until the court enters such judgment

no person shall be denied the right to vote for failure to comply with such qualification, prerequisite, standard, practice, or procedure: *Provided*, That such qualification, prerequisite, standard, practice, or procedure may be enforced without such proceeding if the qualification, prerequisite, standard, practice, or procedure has been submitted by the chief legal officer or other appropriate official of such State or subdivision to the Attorney General and the Attorney General has not interposed an objection within sixty days after such submission, or upon good cause shown, to facilitate an expedited approval within sixty days after such submission, the Attorney General has affirmatively indicated that such objection will not be made. Neither an affirmative indication by the Attorney General that no objection will be made, nor the Attorney General's failure to object, nor a declaratory judgment entered under this section shall bar a subsequent action to enjoin enforcement of such qualification, prerequisite, standard, practice, or procedure. In the event the Attorney General affirmatively indicates that no objection will be made within the sixty-day period following recept of a submission, the Attorney General may reserve the right to reexamine the submission if additional information comes to his attention during the remainder of the sixty-day period which would otherwise require objection in accordance with this section. Any action under this section shall be heard and determined by a court of three judges in accordance with the provisions of section 2284 of Title 28 and any appeal shall lie to the Supreme Court.